

EMERGENCY Chapter NR 323

FISH AND WILDLIFE HABITAT STRUCTURES IN NAVIGABLE WATERWAYS

NR 323.01 Purpose. The purpose of this chapter is to establish reasonable procedures and limitations for exempt activities, general permits and individual permits for placement of fish and wildlife habitat structures in navigable waterways as regulated under s. 30.12, Stats., in order to protect the public rights and interest in the navigable, public waters of the state as defined in s. 30.10, Stats.

NR 323.02 Applicability. This chapter applies to construction, placement and maintenance of fish and wildlife habitat structures regulated under ss. 30.12(1), (1g)(a), (c) and (d), (2m) and (3m) and 30.20(1g)(b)2., Stats. Any person that intends to construct, place or maintain a fish or wildlife habitat structure in any navigable waterway shall comply with all applicable provisions of this chapter and any permit issued under this chapter.

NR 323.03 Definitions. The following definitions apply to this chapter:

(1) "Areas of special natural resource interest" has the meaning in s. 30.01(1am), Stats., and as identified by the department in s. NR 1.05.

Note: "Area of special natural resource interest" means any of the following:

- (a) A state natural area designated or dedicated under ss. 23.27 to 23.29.
- (b) A surface water identified as a trout stream by the department in NR 1.02(7).
- (bm) A surface water identified as an outstanding or exceptional resource water under s. 281.15, Stats.
- (c) An area that possesses significant scientific value, as identified by the department in NR 1.05.

Information and lists can be obtained by contacting the department, or found on the department's website at www.dnr.wi.gov, under the topic "Waterway and Wetland Permits".

(2) "Bank cover" means a man-made structure composed of biological and inert materials designed to provide overhanging cover habitat for fish in streams.

(3) "Biological materials" means living or organic materials that are biodegradable such as native grasses, sedges, forbs, shrubs and trees; live stakes and posts; non-treated wood; jute netting; fiber rolls and mats; logs; and branches.

(4) "Department" means the department of natural resources.

(5) "Fish crib" means a man-made 3-dimensional habitat structure composed of biological or inert materials designed specifically to attract and concentrate fish.

(6) "Half log" means a man-made structure composed of a log sawed lengthwise and anchored flat side down to the bottom of a lake or stream using steel rods for the purpose of providing habitat for fish.

(7) "Inert materials" means those materials that slowly degrade, such as chemically treated wood, stone, stainless and galvanized steel, plastics and synthetic polymers.

(8) "Navigable waterway" means any body of water with a defined bed and bank, which is navigable under the laws of the state. In Wisconsin, a navigable body of water is capable of floating the lightest boat or skiff used for recreation or any other purpose on a regularly recurring basis.

(9) "Nesting structure" means any structure or device constructed for the purpose of improving nesting habitat for wildlife, including birds, mammals, amphibians and reptiles. Nesting structures include but are not limited to wood duck houses and nesting platforms.

(10) "Ordinary high water mark" means the point on the banks or shore up to which the presence and action of water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation or other easily recognizable characteristics.

(11) "Riparian" means an owner of land abutting a navigable waterway.

(12) "Similar device" under s. 30.12(1g)(c), Stats., means a man-made structure composed of biological or inert materials designed specifically for the purpose of providing habitat for fish, including tree drops, half-logs, stake beds, bank covers, brush bundles and low barriers.

(13) "Spawning reef" means an expanse of rock below the surface of the water used by fish for spawning.

(14) "Tree drop" means a man-made structure created by a tree cut and allowed to fall into the water for the purpose of providing habitat for fish.

(15) "Wing deflector" means a man-made structure composed of biological or inert materials placed in streams to deflect stream flow and modify stream channels for the purpose of providing habitat for fish.

NR 323.04 Fish habitat structures. (1) EXEMPTIONS. (a) *Procedures.* Exemptions shall be processed according to the procedures in ch. NR 310.

(b) *Applicable activities.* A fish habitat structure that meets the standards in pars. (c) to (h) shall be exempt under s. 30.12(1g)(c), Stats.

(c) *General standards.* 1. The fish habitat structure may not be located in an area of special natural resource interest as defined in s. 30.01(1am), Stats., and identified by the department in s. NR 1.05.

2. The fish habitat structure may be placed and maintained only by a riparian.

3. The fish habitat structure shall be placed entirely within the riparian's zone of interest, as determined by one of the methods outlined in s. NR 326.04.

4. The fish habitat structure must be placed solely for the purpose of improving fish habitat.

5. The riparian shall report the placement of the structure to the local department fisheries biologist within 30 days after placement. The report shall contain a description of the project and its purpose, the name of the waterway and a map showing where the structure was placed.

6. A deposit of sand, gravel or stone under s. 30.12(1g)(a), Stats., may be associated with the placement of a fish habitat structure provided the deposit is limited to the area immediately underneath or within one foot of the structure and is less than 2 cubic yards.

7. Dredging under s. 30.20(1g)(b)1., Stats., is not allowed for the placement of a fish habitat structure.

(d) *Fish crib standards.* In addition to the standards in par. (c), fish cribs shall meet the following requirements.

1. Fish cribs shall be placed in at least 10 feet of water and have a minimum of 6 feet of water over the top of the structure. The depth and clearance of the fish cribs shall be based on summer water level or normal low water level conditions.

2. Fish cribs shall be constructed of biological materials, with the exception of fastening and anchoring devices.

3. The dimensions of a fish crib shall be no larger than 8 feet tall by 8 feet long by 8 feet wide.

4. Fish cribs may not be placed within 100 feet of swimming beaches or swim rafts.

5. Fish cribs may not be located in soft sediment or muck that is greater than 3 inches in depth.

6. Fish cribs may not be placed where the bottom contour of the waterway exceeds a slope of 4-foot horizontal to one-foot vertical.

(e) *Spawning reef standards.* In addition to the standards in par. (c), spawning reefs shall meet the following requirements.

1. Spawning reefs shall be constructed of an aggregate of clean, uncrushed gravel and rock from 2 to 8 inches in diameter, in a ratio of approximately 30% ranging from 2 to 4 inches in diameter and approximately 70% ranging from 4.1 to 8 inches in diameter.

2. Spawning reefs shall be placed in a linear form parallel to the shore.

3. Spawning reefs shall be no longer than 100 feet along the shoreline and no wider than 30 feet perpendicular to shore.

4. Spawning reefs shall be placed where water depths range from 0 to 5 feet.

5. Spawning reefs may not be placed where bottom contour of the waterway exceeds a slope of 10-foot horizontal to one-foot vertical.

6. Spawning reefs may not be placed greater than 100 feet from shore.

7. Spawning reefs may not be placed where the bottom substrate composition consists of less than 90% clean sand.

Note: Natural walleye spawning reefs generally consist of substrates 2-8 inches in diameter with rounded edges. Natural walleye spawning reefs are located adjacent to gently sloping shorelines in shallow water. Walleye spawning reefs require a moderate amount of wave action to keep the substrate clean of algae and provide adequate water circulation for incubating eggs. The requirement of 90% clean sand indicates a lack of spawning habitat, the appropriate wave action, and substrate capable of supporting the reef. If the water depth remains less than 5 feet and the bottom contour remains less than 10:1, a maximum location of 100 feet from shore is required to reduce navigation concerns.

(f) *Wing deflector standards.* In addition to the standards in par. (c), wing deflectors shall meet the following requirements.

1. Design and placement of wing deflectors shall follow the prescriptions in *Trout Stream Therapy* by Robert L. Hunt or in *Guidelines for Management of Trout Stream Habitat in Wisconsin* by Ray J. White and Oscar M. Brynildson.

Note: Copies of these publications may be inspected by contacting your local department fisheries biologist, and are available at many public libraries.

2. Wing deflectors may only be placed in navigable streams which are less than 5 feet wide, measured from ordinary high water mark to ordinary high water mark.

3. Wing deflectors may not extend more than 25% across the stream width.

(g) *Tree drops*. In addition to the standards in par. (c), tree drops shall meet the following requirements.

1. Tree drops may only be placed in lakes or flowages.

2. Tree drops shall use live trees having a minimum diameter of 12 inches at the base.

3. Tree drops shall be securely anchored to the shore.

Note: Local zoning ordinances may place restrictions on cutting trees in the shoreland zone. The riparian is responsible for ensuring that their tree drop project is in compliance with any local zoning requirements.

(h) *Half log structures*. In addition to the standards in par. (c), half log structures shall meet the following requirements.

1. Half logs shall be constructed from green logs with a minimum diameter of 10 inches.

2. Half logs shall be placed where the bottom substrate composition consists of sand and/or gravel.

3. Half logs may not be placed in water deeper than 5 feet.

4. Half logs may not be placed greater than 100 feet from shore.

(i) Activities which do not meet the standards in pars. (c) to (h) or are determined ineligible for an exemption by the department shall require a general permit or individual permit.

(2) INDIVIDUAL PERMITS. (a) *Procedures*. Individual permits shall be processed according to the procedures in ch. NR 310.

(b) *Applicable activities*. Any fish habitat structure which is not exempt under sub. (1), is not authorized by a general permit, or is located in an area of special natural resource interest requires authorization by an individual permit pursuant to s. 30.12(1), Stats.

(c) *Standards*. A fish habitat structure meeting the standards in s. 30.12(3m), Stats., may be authorized under an individual permit.

Note: Fish habitat projects where the department is the applicant are reviewed under the same standards and following a comparable procedure.

(3) EXISTING PERMITS. A fish habitat structure which is authorized by an existing department permit shall continue to be authorized, provided the structure is maintained in compliance with all the conditions of the original permit. Any modifications to the structure that do not comply with the original permit conditions shall require a new individual permit and shall comply with all standards in this section.

NR 323.05 Wildlife habitat structures. (1) EXEMPTIONS. (a) *Procedures*. Exemptions shall be processed according to the procedures in ch. NR 310.

(b) *Applicable activities*. A nesting structure that meets all the standards in par. (c) shall be exempt under s. 30.12(1g)(d), Stats.

(c) *General standards.* 1. The nesting structure may not be located in an area of special natural resource interest as defined in s. 30.01(1am), Stats., and identified by the department in s. NR 1.05.

2. The nesting structure may be placed and maintained only by a riparian.

3. The nesting structure shall be placed entirely within the riparian's zone of interest, as determined by one of the methods outlined in s. NR 326.04.

4. The nesting structure must be placed solely for the purpose of improving wildlife habitat.

5. A deposit of sand, gravel or stone under s. 30.12(1g)(a), Stats., may be associated with the placement of a nesting structure provided the deposit is limited to the area underneath or within one foot of the structure and is less than 2 cubic yards.

6. Dredging under s. 30.20(1g)(b)1., Stats., is allowed for the placement of a nesting structure provided the dredging does not exceed one cubic yard.

7. The surface area of a nesting structure may not exceed 25 square feet.

8. Nesting structures shall be designed and constructed of unpainted wood or of materials that are non-gloss earhtone colors that blend into a natural shoreline setting during leaf-on conditions.

(d) Activities which do not meet the standards in par. (c) or are determined ineligible for an exemption by the department shall require a general permit or individual permit.

(e) *Exceptions.* 1. Wood duck houses and nesting platforms attached to or supported by existing trees in their natural condition are not regulated under ch. 30, Stats., or this chapter.

2. Wildlife habitat projects authorized under ch. NR 353 relating to wetland conservation activities are not subject to the requirements of this chapter.

(2) INDIVIDUAL PERMITS. (a) *Procedures.* Individual permits shall be processed according to the procedures in ch. NR 310.

(b) *Applicable activities.* Any wildlife habitat structure which is not exempt under sub. (1), is not authorized by a general permit, or is located in an area of special natural resource interest requires authorization by an individual permit pursuant to s. 30.12(1), Stats.

(c) *Standards.* A wildlife habitat structure meeting the standards in s. 30.12(3m), Stats., may be authorized under an individual permit.

Note: Wildlife habitat projects where the department is the applicant are reviewed under the same standards and following a comparable procedure.

(3) EXISTING PERMITS. A wildlife habitat structure which is authorized by an existing department permit shall continue to be authorized, provided the structure is maintained in compliance with all the conditions of the original permit. Any modifications to the structure that do not comply with the original permit conditions shall require a new individual permit and shall comply with all standards in this section.

NR 323.06 Enforcement. (1) Noncompliance with the provisions of ss. 30.12, 30.20 and 30.206, Stats., this chapter, or any conditions of an exemption, general permit or individual permit issued by the department, constitutes a violation and may result in a forfeiture. If the activity is a general permit under s. 30.206, Stats., the failure to follow procedural requirements may not, by itself, result in abatement of the

activity. Unless there is good cause shown, the department shall seek abatement of any activity in violation of ss. 30.12, 30.20 and 30.206, Stats.

(2) General permits may not be issued for after-the-fact permit applications. When an after-the-fact permit application has been filed with the department, the department shall follow the procedures in ch. NR 301 for violations.

(3) Any reference in ss. 30.15, 30.292, 30.294 and 30.298, Stats., to any provision of ch. 30, Stats., shall include any rules promulgated under that provision.

(4) No person may place a fish or wildlife habitat structure in a navigable waterway if the activity is not eligible for an exemption, authorized by a general permit or individual permit issued under this chapter, or otherwise authorized under this chapter.